INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	2
A. The Board's findings of fact	2
B. The Board's conclusions and order	5
C. The decision of the court of appeals	6
Argument	6
Conclusion	10

CITATIONS

Cases:

Cyril de Cordova, 91 NLRB 1121	9
L. G. Everist, Inc., 142 NLRB No. 20	7
National Labor Relations Board v. *Cone Brothers Contracting Co.*, 317 F. 2d 3, certiorari denied, 375 U.S. 945	7
National Labor Relations Board v. *Erie Resistor Corp.* 373 U.S. 221	7
National Labor Relations Board v. *Exchange Parts Co.*, 375 U.S. 405	7
National Labor Relations Board v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333	8
National Labor Relations Board v. *Rockaway News Supply Co.*, 345 U.S. 71	8, 9
National Labor Relations Board v. *Washington Aluminum Co.*, 370 U.S. 9	9
Printing Specialties Union v. *Le Baron*, 171 F. 2d 331	7
Robert H. Snow, d/b/a *Auto Parts Co.*, 107 NLRB 242	7
Rockaway News Supply Co., 95 RB 336	9

Statute: Page

National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*)

Section 7 ..... 5, 6
Section 8(a)(1) 7

Labor Management Relations Act, 61 Stat. 136:

Section 502 ..... 5, 6

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 871

TEAMSTERS, CHAUFFEURS & HELPERS LOCAL UNION NO. 79, ETC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 33a-36a) is reported at 325 F. 2d 1011. The Board's original decision and order (J.A. 6-9)[1] are reported at 130 NLRB 1208. The Board's supplemental decision and order (S.A. 8-13) are reported at 137 NLRB 1545.

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[1] "J.A." references are to the Joint Appendix in the court below. "S.A." references are to the Supplemental Appendix.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1963 (Pet. 2). The petition for a writ of certiorari was filed on February 28, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an employer, motivated solely by business considerations, violates Section 8(a)(1) of the National Labor Relations Act by discharging, and subsequently replacing, employees who refuse to perform services inside a picket line at the premises of another employer.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in Appendix B to the petition (Pet. 1b-4b).

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Redwing Carriers, Inc. and Rockana Carriers, Inc. ("the Company") are common carriers engaged in hauling various products by truck and constitute a single employer for purposes of the Act (J.A. 15; 39-40, 149).[2] For years, they have carried on regular

[2] Petitioner Union is the representative of the Company's employees and was a charging party before the Board.

hauling operations from and to the premises of Virginia-Carolina Chemical Corporation ("V-C") (J.A. 7, 16; 40, 149). On May 22, 1959, the employees of V-C struck and started picketing (J.A. 7, 16; 40). Between that date and June 2, V-C's operations were restricted by the strike, and the Company's hauling operations were cut back from the normal 60-80 loads a day to 13 for the entire period (J.A. 9, 16; 173, 174).

On June 1, V-C requested the Company to resume normal hauling operations (J.A. 9, 16; 173-174). The next morning, the Company gave V-C assignments to some of its drivers who were regularly assigned to that route (J.A. 9-10, 19; 46, 101-102, 127). After discussing the assignments among themselves and with other drivers, the drivers assigned to V-C informed the Company that they were available for other work, but that they would not cross the V-C picket line because they anticipated personal injury and damage to the Company's equipment (J.A. 10, 19; 127-132).[3] The Company told them that they

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[3] Their apprehensions were based principally on the following incidents: On May 27, Company driver Donald Shirley was stopped at an entrance to V-C's property by pickets shouting "scab" and "picket line breaker" (J.A. 17; 71, 73). Shirley turned back and promptly called the Company for instructions; later he was escorted into V-C by a deputy sheriff (J.A. 10, 17; 71-72). On May 29, Company driver Andre Francoeur approached the picket line at one of V-C's facilities to make a pickup. As he did so, between 25 and 30 pickets "strung themselves across the road" blocking his passage (J.A. 17; 59-60). When Francoeur stopped, the apparent leader of the pickets "jumped on the running board" of the truck

must accept their V-C assignments or be discharged (J.A. 10, 19; 115, 124, 131-132), and in order to alleviate their fears stated that police protection would be provided if necessary (J.A. 10, 19; 127-132). Six drivers refused to accept the assignments; the Company thereupon discharged them[4] and transferred their assignments to its other drivers (J.A. 10, 19; 46, 101-102, 124, 129-132; S.A. 12-13). In addition, starting the same day, the Company hired new drivers to replace those discharged (S.A. 9, 12; J.A. 54).

With the other drivers, Company trucks crossed the V-C picket line on June 2 (J.A. 47, 89), and continued to do so thereafter (J.A. 11, 20; 40-42, 47-48,

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and told Francoeur that "it would be more healthy" if he turned around and did not make the pickup (J.A. 17; 60). Francoeur turned around in order to report the incident to the Company and went to a nearby grocery store, followed by about a dozen pickets (J.A. 10, 17; 60-61, 62). There he telephoned the Company and reported what had happened. He was told to stay where he was and that someone would be sent to help him (J.A. 17; 61). After this call, the pickets milled around Francoeur threatening to assault him and crowding him out of the store (J.A. 17-18; 61-62). Upon returning to the terminal, Francoeur reported to the Company and to the other employees what had happened (J.A. 18; 62-63, 66). Also on May 29, while Company drivers John Sewell and Aubrey Cribbs were eating supper in a diner near V-C's premises, they were approached by 8 or 10 men and told "I hope you boys are not planning on going in [to V-C] because we are on strike and if you do we ain't going to promise you what will happen" (J.A. 10, 18; 106).

[4] Two other employees were later discharged for similar reasons, one that afternoon (J.A. 10-11, 19; 107-108), and the other on July 21, the first time he was given a V-C assignment (J.A. 11, 22; 145-146).

89).[5] The Company hauled over 1800 loads into or out of the V-C plant between June 2 and August 1, when the strike ended (J.A. 11).

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board held that, although the employees of the Company engaged in concerted activity within the meaning of Section 7 of the Act in refusing to cross the V-C picket line, the right accorded by Section 7 was not absolute but had to be balanced against the right of the Company to attempt to run its business despite the employees' sympathetic activities (S.A. 10; Pet. 29a-30a). Finding that the Company "terminated the services of the eight drivers not in reprisal for honoring the V-C picket line, but solely to continue [its] business dealings with V-C," and that it had "terminated the services of the employees only so it could immediately or within a short period thereafter replace them with others willing to perform the scheduled work," the Board concluded that the Company's action was not unlawful (S.A. 12-13; Pet. 31a-32a).[6] The Board accordingly dismissed the complaint in its entirety (S.A. 13; Pet. 32a).

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[5] On June 27, 1959, a Florida state court issued an injunction which, *inter alia*, restrained ten individuals, found to have comitted acts of violence on the picket line, from further participation in the picketing (J.A. 11; 53). There were no further acts of violence on the line after that date, although one acid-throwing incident occurred elsewhere (J.A. 11; 52-53).

[6] The Board rejected the alternative contention that the refusal to cross the V-C picket line was privileged under Section 502 of the Labor Management Relations Act, which pro-

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals sustained the Board's findings and conclusions, and affirmed the Board's order dismissing the complaint (Pet. 33a-36a).

ARGUMENT

The decision of the court of appeals is correct. There is no conflict of decisions and no need for further review.

1. Section 7 of the Act gives employees the right "to form, join, or assist labor organizations" and to engage in "concerted activities for the purpose of * * * mutual aid or protection." Employees who refuse to cross a picket line at the premises of another employer with whom the picketing union has a primary dispute clearly render assistance to that labor organization. Moreover, since the employees render such assistance with the expectation that the union and its members will reciprocate should the employees be in a similar situation, the refusal to cross

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vides that "the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees [shall not] be deemed a strike under this Act." The Board found (J.A. 10-12) that the picket line misconduct at the V-C premises prior to June 2, 1959, while not to be condoned, constituted "disorder * * * not unusual in any extensive strike," and that "abnormally dangerous conditions" within the meaning of Section 502 did not prevail at V-C when the drivers refused their assignments there (J.A. 11-12; Pet. 6a-7a). The court of appeals found this finding to be supported by substantial evidence (Pet. 36a), and petitioner does not challenge it here.

the picket line is likewise a form of concerted activity for mutual aid or protection. See *Printing Specialties Union* v. *Le Baron*, 171 F. 2d 331, 334 (C.A. 9). Accordingly, an employer who discharges an employee for refusing to cross a primary picket line at the premises of another employer, as a reprisal for having engaged in that activity or to discourage unionization, violates Section 8(a)(1) of the Act. See *National Labor Relations Board* v. *Cone Brothers Contracting Co.*, 317 F. 2d 3 (C.A. 5), certiorari denied, 375 U.S. 945; *L.G. Everist, Inc.*, 142 NLRB No. 20. But action taken by an employer which is an unfair labor practice when motivated by anti-union considerations may be privileged when taken for normal business reasons. See *National Labor Relations Board* v. *Exchange Parts Co.*, 375 U.S. 405; cf. *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221. Thus, the Board has concluded that it is not unlawful for an employer, motivated by a desire to maintain his operations, to replace an employee who refuses to cross a picket line at the premises of another employer with an employee who will. See *Robert H. Snow, d b a Auto Parts Co.*, 107 NLRB 242; S.A. 10-11; Pet. 29a-30a.

That principle was properly applied here. The Board found (S.A. 12-13; Pet. 31a-32a), and the court of appeals accepted its finding (Pet. 36a), that the Company terminated the services of the drivers not in reprisal for honoring the V-C picket line, but solely to continue business relations with V-C; and that, when the drivers refused to make deliveries

to V-C, the Company transferred other men from their normal jobs to make these deliveries and in addition hired new men to replace the discharged drivers.

2. The issue of the extent to which the refusal to cross a "stranger" picket line is protected by Section 7 of the Act was presented in *National Labor Relations Board* v. *Rockaway News Supply Co.*, 345 U.S. 71, but the Court did not reach it; for the Court found that any right the employee (Waugh) possessed had been waived by his bargaining agent in the no-strike clause of the contract with the employer. However, in *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 347, the Court held that an employer, in the interest of running his business, may permanently replace employees who are out on an economic strike, although such action tends to limit the right to strike. That principle is equally applicable here. Since employees who go out on an economic strike against their own employer are subject to replacement, the Act should not be construed to accord any greater protection to employees who refuse to perform some of their normal work for their employer because of sympathy for those engaged in a dispute with another employer. This distinction—that an employer may not discharge employees for refusing to cross another employer's picket line as an act of reprisal or to discourage union activity, but may do so where his motive is to run his business and where he promptly transfers the duties of the discharged employee to other employees and hires replacements—places employees who desire

to respect such a picket line in a position essentally similar to that of the economic strikers.[*] Indeed, *Rockaway* recognizes the propriety of this equation, for the Court emphasized that there was "no finding, evidence or even charge that the dismissal of Waugh resulted from antiunion bias, or was intended to or did discriminate against him to discourage membership in a labor organization"; and there was "no finding that he was not replaced either by a new employee or by transfer of duties to some nonobjecting employee, as would appear necessary if the respondent were to maintain the operation" (345 U.S. at 75).

National Labor Relations Board v. *Washington Aluminum Co.*, 370 U.S. 9, upon which petitioner relies (Pet. 11-13), is inapposite. That case did not involve the extent to which employees are protected in refusing to cross a picket line at the premises of another employer, but simply the issue whether a spontaneous walkout by an unorganized group of employees in protest over abnormally cold working conditions was unprotected because the employees first had not given

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[*] The exact equivalent would be to require the employer, before discharging an employee who has refused to cross a picket line, to put him in the status of a striker and find a replacement. The Board originally required this added step (see *Cyril de Cordova*, 91 NLRB 1121, 1137-1138; *Rockaway News Supply Co.*, 95 NLRB, 336, 337), but the court in *Rockaway* stated that it was "unrealistic" in this context (345 U.S. at 75). Accordingly the Board has since held that it is sufficient if the duties of the discharged employee are transferred to other employees or replacements are hired contemporaneously with or shortly after the discharge (see S.A. 11-12; Pet. 30a-31a).

the employer an opportunity to correct the grievance. There was no question of hiring replacements for men unwilling to do their normal work.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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